Filed 6/29/10 P. v. Engelbrektson CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL SEAN ENGELBREKTSON, Defendant and Appellant.	A123906 (Contra Costa County Super. Ct. No. 050809467)

This is an appeal from judgment following the conviction of defendant Michael Sean Engelbrektson for residential burglary and resisting a peace officer. Defendant contends the judgment must be reversed because the trial court erroneously accepted the prosecution's race neutral explanation for exercising a peremptory challenge against an African-American prospective juror. Defendant also requests that we recalculate the number of conduct credits to which he is entitled in light of an amendment to the relevant statute, Penal Code section 4019, which became effective after sentencing but before final judgment.[1] We agree with defendant this matter must be remanded to the trial court to recalculate his conduct credits in light of the amendatory statute, but in all other regards affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with residential burglary (§§ 459, 460) (count one), felony theft of a firearm (*id.*, § 487, subd. (d)) (count two), and misdemeanor

[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

resisting or delaying a peace officer (*id.*, §148, subd. (a)) (count three). The information further alleged that defendant had previously been convicted of a crime for which he served a prison sentence.[2]

Although of slight relevance to the issues raised on appeal, we briefly describe the facts underlying the charges against defendant. On April 4, 2008, Police Officer Tim King responded to a call regarding a suspicious dark car in the St. Regis neighborhood of the City of Brentwood. Officer King located this car parked in front of a residence on St. Regis Avenue. When Officer King approached this residence on foot, he saw three young males, one of whom was later identified as defendant, holding various unidentified items in the garage. Upon seeing the officer, the three male suspects ran through the inside of the house before reemerging in the backyard. Officer King yelled at the suspects to stop, but they did not. Shortly thereafter, other police officers arrived in the area, one of whom eventually caught and detained defendant as he ran from the residence. Defendant did not have stolen property on his person when he was arrested, however, at least one of the other three suspects did.

Following a jury trial which began on December 4, 2008, defendant was found guilty of count one, residential burglary, and count three, resisting a peace officer. Defendant was found not guilty of count two, felony theft of a firearm.

At the subsequent sentencing hearing, the trial court found true the allegation that defendant had previously been convicted of a crime for which he had served a prison term. Defendant was then sentenced to a mitigated term of two years in state prison for count one; a consecutive one-year term for the prior prison term; and 180 days in county jail for count three, with full credit for time served as to that count. In addition, defendant received 281 days of actual custody credit plus 141 days of conduct credit. This timely appeal followed.

---

[2] The information, as originally filed, alleged a prior strike (§ 667). However, the information was later amended to dismiss the prior strike allegation and to renumber the remaining counts.

DISCUSSION

On appeal, defendant challenges his conviction on two grounds. First, defendant contends his state and federal constitutional rights were violated when the prosecutor exercised a peremptory challenge to remove an African-American member of the jury pool without a race-neutral justification. Second, defendant contends the trial court must recalculate the number of conduct credits to which he is entitled under the current version of section 4019, which was amended effective January 25, 2010. We address each issue in turn.

I. Denial of Defendant's *Batson/Wheeler* Motion.

Defendant's first challenge is to the trial court's denial of his motion under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Batson*/*Wheeler*), objecting to the prosecutor's exercise of a peremptory challenge against a prospective juror on allegedly improper grounds. The relevant legal principles are not in dispute.

"The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article 1, section 16 of the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 [148 Cal.Rptr. 890, 583 P.2d 748]) as well as the equal protection clause of the Fourteenth Amendment to the United States Constitution. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 89 .)" (*People v. Burgener* (2003) 29 Cal.4th 833, 863.)

" 'A party who suspects improper use of peremptory challenges must raise a timely objection and make a prima facie showing that one or more jurors has been excluded on the basis of group or racial identity. The high court has explained that the defendant is required to "raise an inference" that the exclusion was based on group or race bias. [Citation.] Once a prima facie showing has been made, the prosecutor then must carry the burden of showing that he or she had genuine nondiscriminatory reasons for the challenges at issue.' (*People v. Jenkins* (2000) 22 Cal.4th 900, 993 [95

Cal.Rptr.2d 377, 997 P.2d 1044] (*Jenkins*).)" (*People v. Burgener, supra*, 29 Cal.4th at pp. 863-864.)

Here, defendant objected to the prosecutor's exercise of a peremptory challenge to remove "A.D.," an African-American prospective juror, from the jury pool. The trial court, finding an inference that A.D. was excluded based on her racial identity, ordered the prosecutor to explain the basis for the challenge.

The prosecutor responded that the basis for her peremptory challenge was two-fold. First, the prosecutor believed that A.D. had manifested an anti-police bias when questioned regarding her frequent interactions with police officers in her professional capacity as a property manager. In particular, the prosecutor noted that A.D. acknowledged having had "good and bad" experiences with the Richmond Police Department in terms of their responsiveness to reports of break-ins, and that "[the prosecution] only ha[s] officers in this case to rely on" to prove its case.[3] Second, the prosecutor observed that A.D. appeared inattentive at times during the voir dire of other prospective jurors, adding that she pays close attention to whether prospective jurors "are paying attention or not," and that A.D. was "sort of . . . nodding in different points."

The trial court initially appeared skeptical regarding the prosecutor's explanation: "I guess I'm at a loss as to how [A.D.'s] answers are different from others . . . , in the sense that she seemed very willing to follow the Court's instructions. She's seen her property be the victim weekly of burglaries as well as robberies of the tenants. She's had to deal with law enforcement on many occasions. [¶] What — I'm trying to understand

---

[3] Specifically, when the prosecutor questioned A.D. about her experiences with law enforcement, she replied: "They have been mixed feelings. Sometimes I believe they're very helpful; other times they are not. Just depending on the situation and the cop that you're dealing with." A.D. insisted she could nonetheless fairly and impartially judge police officers' testimony, while later observing when asked about the frequent break-ins at the property she managed that, "It's a little bit more personal and close because that's the property where I work. And within — for instance, the past month we had about four apartment break-ins and so far there haven't been any arrests in the case. So it's sometimes a little difficult to deal with."

what it was about her answers that led you to believe that she could not be fair and impartial when her answers were clearly, on the face, neutral."

Ultimately, however, the trial court denied defendant's *Batson/Wheeler* motion, accepting the prosecutor's stated reasons for challenging A.D and explaining as follows: "All right. I did not notice yesterday [A.D.'s] demeanor as you have described it. And I agree with you demeanor is a very important part of the process. And if someone is not paying attention or is otherwise occupied during voir dire, that can play a large role. [¶] I'm gonna accept [the prosecutor's] word . . . , as an officer of the Court, that that is what you observed yesterday because I'm not persuaded that her answers as given, at least viewing them from here, that they indicated that she could not be fair. [¶] But if you noticed that her demeanor suggested to you that she was either not paying attention to the proceedings or she was disinterested in the proceedings or that the Court would have some reason to be concerned about her ability to listen to the testimony, then I'm going to deny the . . . motion at this time and I will allow her to be excused."

According to defendant, this ruling was erroneous because the trial court failed to properly conduct the analysis required under the third step of the *Batson/Wheeler* test, and because the evidence supports an inference that the peremptory challenge was made for racially motivated reasons.

"We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges ' "with great restraint." ' [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Burgener, supra*, 29 Cal.4th at p. 864.)

Having reviewed the record, we conclude substantial evidence supports the trial court's acceptance of the stated justification for excusing A.D. from the jury pool – to wit, that A.D.'s demeanor suggested she would be inattentive during the proceedings. As

the People point out, a prosecutor's reason for exercising a peremptory challenge "need not rise to the level justifying exercise of a challenge for cause." (*Batson v. Kentucky, supra*, 476 U.S. at p. 97.) "Jurors may be excused based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." (*People v. Turner* (1994) 8 Cal.4th 137, 165.) In this context, "a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." (*Purkett v. Elem* (1995) 514 U.S. 765, 769.) Applying these principles here, we find defendant has failed to demonstrate the prosecutor's explanation denied him equal protection under the law.

In reaching this conclusion, we reject defendant's argument that the trial court failed to properly conduct the third step of the *Batson/Wheeler* analysis. As set forth above, the third step of this analysis required the trial court to determine whether defendant proved the prosecutor's challenge amounted to purposeful discrimination. (*People v. Burgener, supra*, 29 Cal.4th at pp. 863-864.) "[T]he critical question in determining whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339.)

Of particular significance under the circumstances of this case, where "the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during *voir dire*." (*Thaler v. Haynes* (2010) 130 S.Ct. 1171, 1174-1175.) However, this does not mean that, in the absence of a personal recollection of the challenged juror's demeanor, the judge must reject the prosecution's demeanor-based explanation. Rather, in such a situation, "the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." (*Id.* at p. 1175, citing *Snyder v. Louisiana* (2008) 552 U.S. 472, 477.)

Here, the record reflects that, contrary to defendant's claim, the trial court properly engaged in the third step of the *Batson/Wheeler* test. Specifically, the trial court considered the relevant circumstances with respect to the prosecutor's challenge,

including A.D.'s responses to questioning by the attorneys, and its own lack of any recollection that A.D. appeared inattentive when other prospective jurors were being questioned. The trial court thereafter decided to accept the prosecutor's recollection that A.D. had in fact been inattentive. Whether this decision was reached based on the prosecutor's truthful demeanor, the trial court's lack of certitude with respect to its own recollection of A.D.'s demeanor, or a combination of both factors cannot be gleaned from this record. On the other hand, nor is there anything in the record to cause us to question the trial court's superior judgment in this regard, particularly given that the trial court, unlike this court, had the ability to actually observe both A.D. and the prosecutor at the hearing. As set forth above, the U.S. Supreme Court itself has observed that "the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." (*Thaler v. Haynes, supra,* 130 S.Ct. at p. 1175, citing *Snyder v. Louisiana, supra,* 552 U.S. at p. 477.)

Thus, we conclude on this record that the trial court indeed made "a sincere and reasoned effort" to evaluate the prosecutor's race-neutral explanation for excusing A.D., and that the trial court's acceptance of this explanation is entitled to deference on appeal. (*People v. Burgener, supra,* 29 Cal.4th at p. 864; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 993.) Accordingly, we reject defendant's *Batson/Wheeler* challenge as a basis for overturning the judgment.

II. Presentence Conduct Credit.

Defendant further contends he is entitled to additional presentence conduct credit pursuant to section 4019, as amended, which became effective on January 25, 2010. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010 ("Sen. Bill No. 3X 18").)

Under the former version of section 4019, in effect in January of 2009 when defendant was sentenced, a criminal defendant sentenced to state prison could accrue conduct credit based on his or her willingness to perform assigned labor or compliance with relevant rules and regulations at the rate of two days for every four days of actual presentence custody. (Former § 4019.) Under the version of section 4019 that became effective on January 25, 2010 ("amended version of section 4019" or "amendatory

statute"), a criminal defendant can accrue such credit at the rate of four days for every four days of presentence custody, so long as he or she is not required to register as a "sex offender" (§ 290 et seq.) and has not been convicted of a "serious felony" (§ 1192.7) or "violent felony" (§ 667.5).

As the legislative history reveals, the amendments to section 4019 were adopted as part of Sen. Bill No. 3X 18, which was introduced at a special session called by the Governor on December 19, 2008, in response to a fiscal emergency. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50; see Governor's Proclamation to Leg., Sen. Daily J., Jan. 5, 2009, pp. 2-4.) Among other things, Sen. Bill No. 3X 18 was designed to lower the cost of prison administration by reducing prison populations without undermining public safety. (*Ibid.* See also *People v. Norton* (2010) 184 Cal.App.4th 408, 419, fn. 14.)

In this case, the trial court calculated defendant's conduct credits under the former version of section 4019 because, at the time of sentencing, the amended version of the statute was not yet effective. Defendant contends the Legislature intended the amendatory statute to have retroactive application. Accordingly, defendant asks that we recalculate his conduct credits under the amendatory statute, given that his conviction was not final as of January 25, 2010, the date the amendatory statute became effective.

The general principles governing whether a statutory amendment has retroactive or prospective application are not in dispute. As a general rule, a new or amendatory statute is presumed to operate prospectively rather than retroactively in the absence of a clear and compelling indication that the Legislature intended otherwise. (*People v. Alford* (2007) 42 Cal.4th 749, 753; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209.) Consistent with this general rule, section 3 provides that " [n]o part of [the Penal Code] is retroactive, unless expressly so declared." (§ 3.)

Here, the People rely on section 3 to argue that the amended version of section 4019 should operate prospectively rather than retroactively because there is "no explicit indication" of a contrary legislative intent. However, as the California Supreme Court has explained, "the general rule of construction, coming to us from the common law, that when there is nothing to indicate a contrary intent in a statute it will be presumed that the

Legislature intended the statute to operate prospectively . . . is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." (*In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*).) Thus, our role in this case, under this binding authority, is to determine the legislative intent with respect to the amended version of section 4019 from "all pertinent factors." (*Ibid*.)

The facts of *Estrada* are helpful to our inquiry. There, the defendant, an inmate, was convicted of escape without force or violence in violation of section 4530. (*Estrada, supra,* 63 Cal.2d at p. 743.) When the defendant committed this crime, section 3044 provided that a person convicted of escape under section 4530 could not be paroled until he or she had served at least two calendar years, calculated from the date of his or her return from prison after conviction. After the defendant committed the crime but before he was sentenced and convicted, sections 3044 and 4530 were amended, such that a person convicted of escape without force or violence could be eligible for parole in less than two years. (*Id*. at pp. 743-744.) Deciding that the amended versions of sections 3044 and 4530 would apply to the defendant, the *Estrada* court reasoned that "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law." (*Id*. at p. 745.)

As the parties point out, California appellate courts are split on the question of whether the amended version of section 4019 represents a "legislative mitigation of the penalty" for commission of certain crimes, and thus whether the amendatory statute comes within the rule of retroactive application announced in *Estrada*.[4] This court, very

[4] The California Supreme Court has recently granted petitions for review in three relevant cases. In *People v. Landon* (2010) 183 Cal.App.4th 1096 and *People v. Brown* (2010) 182 Cal.App.4th 1354, the First District and the Third District, Courts of Appeal, respectively, held that the amendment to section 4019 was intended to apply retroactively

recently, sided with our colleagues in the First District and the Third District in holding that the amended version of section 4019 does indeed come within the *Estrada* rule, and thus should operate retroactively. In doing so, we reasoned as follows: "We conclude that section 4019, as amended, is a statute lessening punishment, as it operates to reduce the sentences of qualified prisoners. Under section 4019, a prisoner accrues time for good conduct that is 'deducted from his or her period of confinement . . . .' (§ 4019, subds. (b)(1) & (c)(1).) The amendments to this section increase the rate at which a prisoner accrues such time against his sentence, and, as the Attorney General concedes, 'will necessarily shorten sentences . . . .' We are not persuaded a provision that necessarily reduces the sentences of qualified prisoners is any less an 'amendatory statute that mitigates punishment' simply because it achieves this end by increasing sentencing credits. California courts have not limited *Estrada*'s application to provisions that directly lessen the punishment for a particular offense. [Fn. omitted.] Indeed, a majority of Courts of Appeal in California holds that provisions affording or increasing sentencing credit are statutes lessening punishment under *Estrada*." (*People v. Norton, supra,* 184 Cal.App.4th at p. 417.)

Neither our opinion nor our reasoning in this regard has changed since publication of *People v. Norton* on May 5, 2010. Accordingly, we conclude in this case that defendant is entitled to the benefit of retroactive operation of section 4019, as amended by Sen. Bill No. 3X 18. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) We thus remand this case to the trial court to recalculate defendant's conduct credits in accordance with this opinion.

DISPOSITION

The matter is remanded to the trial court with instructions to amend the abstract of judgment to recalculate the conduct credits to which defendant is entitled pursuant to section 4019, as amended, and to deliver a certified copy of the amended abstract of

---

as to those eligible defendants whose convictions were not final on the effective date. In *People v. Rodriguez* (2010) 183 Cal.App.4th 1, to the contrary, the Fifth District, Court of Appeal, held that the amendment to section 4019 was intended to apply prospectively.

judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other regards.

_____
Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.